Tiew Kun @ Tiew Boon Eu v Tneu Seng Bee & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–711 OF 2004 AND W-02–715 OF 2004
TENGKU BAHARUDIN SHAH, ABDUL MALIK ISHAK AND JEFFREY TAN JJCA
8 JULY 2009

Civil Procedure — Judgments and orders — Clarification of order of court — Principles applicable — Whether order ought to be scrutinised

Civil Procedure — Judgments and orders — Drawing up of orders — Draft order approved and carefully signed by solicitors — Whether schedule allegedly left out of order — Whether improbable that Schedule inadvertently left out

The issue in the instant case was whether certain monies constituted proceeds from the realisation of a trust property that formed part of other trust properties listed in a Schedule E of an order of court dated 18 July 1994 ('the said order'). The appellant contended that the said monies were realised from the sale of a property listed in Schedule E of the said order but the respondents contended to the contrary. The SAR held that the monies formed part of the trust properties listed in Schedule E. The High Court judge however held that those monies were not realised from any property within the ambit of the said order. The appellant thus appealed to the Court of Appeal.

Held, dismissing the appeals:

(1) A close scrutiny of the order dated 18 July 1994 revealed that Schedule E was not a part of it (see paras 4–5); *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353; *Seth Manakchand v Chaube Manoharlal & Anor* AIR 1944 PC 46 referred.

(2) Unless there is ambiguity, it is the order or decree alone that settles the verdict of a court. In the instant case, the terms of the said order dated 18 July 1994 were absolutely clear and categorical (see para 7); *Brosseau v Berthiaume* [1993] OJ 532 referred.

(3) It did not appear that Schedule E had been inadvertently left out from the order dated 18 July 1994. The draft order was approved by all solicitors concerned who had taken special care to put their signatures not only on the final page, but on each and every page of the draft order. That evinced that each and every page of the draft order would have been carefully read by all, and that measures were adopted to ensure that the integrity of the draft order, as approved, would remain intact. Thus it was improbable that so many trained eyes could have failed to notice that the said Schedule E was not mentioned and annexed to the said draft order (see para 7).

(4) The Court of Appeal's perusal of the appeal record confirmed that the said Schedule E was consciously left out from the said order dated 18 July 1994. In any event, the instant appellant knew that no order had been made in relation to Schedule E as he had cross-appealed to vary the order dated 18 July 1994 on the basis that the High Court had omitted Schedule E, which cross-appeal had been dismissed (see paras 8–9).

[Bahasa Malaysia summary

Isu dalam kes ini adalah sama ada sejumlah wang tertentu merupakan wang yang diperoleh daripada jualan harta amanah yang menjadi sebahagian daripada harta amanah yang disenaraikan di dalam Jadual E perintah mahkamah bertarikh 18 Julai 1994 ('perintah tersebut'). Perayu menyatakan bahawa wang tersebut diperoleh daripada jualan hartanah yang disenaraikan dalam Jadual E perintah tersebut tetapi responden-responden menyatakan sebaliknya. Penolong kanan pendaftar memutuskan bahawa wang itu menjadi sebahagian harta amanah yang disenaraikan di dalam Jadual E. Hakim Mahkamah Tinggi bagaimanapun memutuskan bahawa wang tersebut tidak diperolehi daripada jualan sebarang hartanah dalam rangkuman perintah tersebut. Perayu oleh itu merayu kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan-rayuan:

(1) Penelitian rapi ke atas perintah bertarikh 18 Julai 1994 tersebut mendedahkan bahawa Jadual E bukan sebahagian daripadanya (lihat perenggan 4–5); *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353; *Seth Manakchand v Chaube Manoharlal & Anor* AIR 1944 PC 46 dirujuk.

(2) Melainkan terdapat kekaburan, perintah atau dekri itu sahaja yang menentukan keputusan sebuah mahkamah. Dalam kes ini, terma-terma

perintah bertarikh 18 Julai 1994 tersebut adalah benar-benar jelas dan mutlak (lihat perenggan 7); *Brosseau v Berthiaume* [1993] OJ 532 dirujuk.

(3) Tidak kelihatan bahawa Jadual E telah dengan tidak sengaja ditinggalkan daripada perintah bertarikh 18 Julai 1994 tersebut. Draf perintah mahkamah telah diluluskan oleh semua peguam cara yang meneliti dan menandatangani bukan sahaja atas muka surat yang terakhir, tetapi juga atas setiap muka surat draf perintah mahkamah tersebut. Ini menunjukkan bahawa setiap muka surat draf perintah mahkamah tersebut telah diteliti dan dibaca oleh semua pihak, dan langkah-langkah telah diambil untuk memastikan integriti draf perintah mahkamah tersebut, yang telah diluluskan, dikekalkan. Oleh itu, adalah tidak mungkin kesemua pakar gagal mendapati bahawa Jadual E tersebut tidak disebut dan dilampirkan bersama dengan draf perintah tersebut (lihat perenggan 7).

(4) Penelitian Mahkamah Rayuan terhadap rekod rayuan mengesahkan bahawa Jadual E tersebut adalah dengan sengajanya tidak dimasukkan dalam perintah bertarikh 18 Julai 1994 tersebut. Walau apa pun, perayu sedar bahawa tiada perintah telah dibuat berkaitan dengan Jadual E kerana dia telah membuat rayuan balas untuk mengubah perintah bertarikh 18 Julai 1994 tersebut atas alasan yang Mahkamah Tinggi telah tidak memasukkan Jadual E, di mana rayuan balas telah ditolak (lihat perenggan 8–9).]

Notes

For cases on clarification of order of court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4056–4059.

For cases on drawing up of orders, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4117–4118.

Cases referred to

Brosseau v Berthiaume [1993] OJ 532 (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, FC (refd)

Seth Manakchand v Chaube Manoharlal & Anor AIR 1944 PC 46 (refd)

Conrad Young (Sreenevasan Young) for the appellant in Civil Appeal No W-02–711 of 2004.

Saranjit Singh (Riza Leong & Partners) for the first and second respondents in Civil Appeal No W-02–711 of 2004.

Yee Mei Ken (Shearn Delamore & Co) for the fifth respondent in Civil Appeal No W-02–711 of 2004.

Andrew Chiew (Lee Hishammuddin Allen & Gledhill) for the appellants in Civil Appeal No W-02–715 of 2004.

Saranjit Singh (Riza Leong & Partners) for the first, second and third respondents in Civil Appeal No W-02–715 of 2004.

Yee Mei Ken (Shearn Delamore & Co) for the fourth respondent in Civil Appeal No W-02–715 of 2004.

Jeffrey Tan JCA:

[1] In a word, these two appeals turned essentially on the construction or interpretation of the following order of court dated 18 July 1994 in Kuala Lumpur High Court Civil Suit No D3–22–28 of 1992, namely the action from which these two appeals emanated.

DI HADAPAN YANG ARIF PUAN HAKIM DATO' SITI NORMA YAAKOB

PADA 18 HARIBULAN JULAI, 1994

DI MAHKAMAH TERBUKA

PERINTAH

SETELAH TINDAKAN INI dibicarakan pada 18 haribulan Mei, 1993 dan diteruskan pada 19 haribulan Mei, 1993, 9 haribulan September, 1993 hingga 24 haribulan September, 1993, 7 haribulan Oktober, 1993, 8 haribulan Oktober, 1993, 22 haribulan April, 1994 dan 6 haribulan Mei, 1994 DAN SETELAH MENDENGAR keterangan lisan saksi-saksi dan keterangan dokumentari yang dikemukakan DAN SETELAH MENDENGAR Encik K S Narayanan (Encik Y K Leong dan Cik Preeti Kaur Boler bersamanya) peguam bagi Plaintif-Plaintif (melalui tindakan asal dan Defendan-Defendan Pertama hingga Keenam, Kesebelas dan Keduabelas melalui tuntutan balas) dan Encik Robert Lazar (Cik Foo Yet Ngo bersamanya) peguam bagi Defendan-Defendan Pertama dan Kedua (melalui tindakan asal dan Plaintif melalui tuntutan balas) dan Encik D P Naban peguam bagi Defendan-Defendan Ketigabelas dan Keempatbelas melalui tuntutan balas) ADALAH DIPERINTAHKAN bahawa tindakan ini ditangguh untuk keputusan dan setelah tindakan ini dipanggil untuk keputusan pada 18 haribulan Julai, 1994 ADALAH DIPERINTAHKAH bahawa:-

(1) tuntutan Plaintif dibatalkan dengan kos;

(2) tuntutan balas Defendan-Defendan dibenarkan dengan kos dan bahawa segala harta yang disenaraikan dalam Jadual-Jadual A, B, C di dalam tuntutan balas dan dilampirkan di sini dan diperakui dibahagikan secara samarata antara Plaintif, Tneu Beh, Defendan Kedua, Tiew Kun @ Tiew Boon Eu, Defendan Ketiga, Tew Hon Liam @ Tneu Boon Beng, Defendan Keempat Tew Tian Lam @ Tneu Boon Seng dan bahawa harta-harta tersebut akan merangkumi:-

(i) rumah lot B (Bahagian tanah yang dikenali sebagai Lot 2242 Lokaliti Tanjong Sepat New Village Mukim Batu, No. ML 146 Negeri Selangor) yang telah didaftarkan dalam nama Tneu Beh sebagai benefisiari tunggal estet Thean Cheng Kang @ Tiew Cheng Kang;

(ii) harta-harta lain, atau nilainya, yang telah dijual oleh mana-mana tiga orang adik lelaki;

(iii) segala syer yang dikeluarkan dan dibaya di dalam syarikat-syarikat yang dikenali sebagai Tanjong Kelapa Sawit Sdn Bhd dan Lumayan Plantations Sdn Bhd termasuk syer yang didaftarkan dalam nama-nama Tneu Beh dan ahli-ahli keluarga rapatnya;

(iv) 210,000 saham-saham Lumayan yang didaftarkan dalam nama Tanjong Kelapa Sawit Sdn Bhd.

(3) RM912,870-45 dibayar dari harta keluarga kepada Defendan Kedua, Tiew Kun @ Tiew Boon Eu, sebelum pembahagian dilaksanakan seperti yang dinyatakan dalam perenggan (2) di atas.

Bertarikh pada 18 haribulan Julai, 1994.

TIMBALAN PENDAFTAR

MAHKAMAH TINGGI

KUALA LUMPUR

[2] The appeal record disclosed that pursuant to the aforesaid order dated 18 July 1994, a sum of RM23,000 and RM131,602.94 was deposited by the second and sixth defendants to Messrs Shearn Delamore & Co to hold as stakeholders. Those monies were claimed later by the second and sixth defendants. Issue arose as to whether those monies were realised from the sale of a property (71, Leboh Bagor, Klang, Selangor) that fell through within the ambit of the aforesaid order dated 18 July 1994. Caught in a bind, the stakeholders applied (vide encl 117) to court to settle that issue. The learned senior assistant registrar held that those monies formed part of the trust properties listed in Schedule E of the said order dated 18 July 1994. However, on appeal by the second and sixth defendants to judge in chambers, Zulkefli J (now FCJ), held that those monies were not realised from any property within the ambit of the said order dated 18 July 1994. Zulkefli J ordered the said monies to be released to the second and sixth defendants. Hence these appeals, by the plaintiff (W-02–711 of 2004) and by the third and fourth defendants (W-02–715 of 2004).

[3] Before us, all learned counsel (Mr Conrad Yeong for the appellant in W-02–711 of 2004; Mr Andrew Chew for the appellants in W-02–715 of 2004; Mr Saranjit Singh for the first and second respondents in W-02–711 of 2004 and first, second and third respondents in W-02–715 of 2004; and Mr Yee Mei Ken for fifth respondent in W-02–711 of 2004 and fourth respondent in W-02–715 of 2004) confirmed that the said order dated 18 July 1994 had been affirmed by the Court of Appeal, that leave to further appeal had been refused by the Federal Court, and that the order dated 18 July 1994 was final and conclusive.

[4] Finality of the said order dated 18 July 1994 was agreed. But the terms of the said order dated 18 July 1994 were in dispute. It was contended by the appellants that the said monies were realised from the sale of a property (71, Leboh Bagor, Klang, Selangor) listed in Schedule E of the said order dated 18 July 2004 and should therefore be equally distributed. On the other hand, it was contended by the respondents to the contrary. That called upon us to read and interpret the said order itself (see *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353, where it was held by the Federal Court, per Chong Siew Fai CJ (Sabah and Sarawak) citing Sir George Rankin in *Seth Manakchand v Chaube Manoharlal & Anor* AIR 1944 PC 46, that 'for the purpose of interpreting a decree no other document is so directly in point as the judgment or case in the nature of things have comparable force').

[5] The approach of a close scrutiny of the order or decree was similarly adopted by Zulkefli J who found that the said Schedule E was not in the said order — 'tidak termasuk dalam perintah tersebut'. On our part, we also could not unearth the said Schedule E from the said order dated 18 July 1994, which only directed that the assets and properties listed in Schedules A, B and C be equally distributed — 'tuntutan balas Defendan-Defendan dibenarkan dengan kos dan bahawa segala harta yang disenaraikan dalam Jadual-Jadual A, B, C di dalam tuntutan balas dan dilampirkan di sisi dan diperakui dibahagikan secara samarata antara ... '. Simply put, Schedule E was not part of the said order dated 18 July 1994.

[6] Nevertheless, it was contended by Mr Conrad Yeong (Mr Andrew Chew adopted his submission) that the said Schedule E was yet part and parcel of the said order dated 18 July 1994. Learned counsel first drew our attention to the fact that the said Schedule E was 'included' in the counterclaim and to the further fact that the counterclaim was allowed. Learned counsel argued that when the counterclaim was allowed, Schedule E was also allowed in tandem.

[7] But with respect, we found that reasoning to be utterly flawed, for what was allowed in the said counterclaim must be construed from the terms of the said order dated 18 July 1994 itself. 'In accordance with the general rules of interpretation, the language used in a judgment or order must be construed according to its ordinary meaning and not in some unnatural or obscure sense' (*Brosseau v Berthiaume* [1993] OJ 532). Unless there is ambiguity, it is the order or decree alone that settles the verdict of a court. In the instant case, we found the terms of the said order dated 18 July 1994 to be absolutely clear and categorical. The counterclaim was allowed, but only to the extent of the

properties and or assets listed in Schedules A, B, and C. And it would not appear to us that the said Schedule E could have been inadvertently left out. Orders are extracted with the prior approval of parties. We observed that the draft order was approved by all solicitors concerned who had taken special care to put their signatures on not only the final page, but on each and every page of the draft order. That evinced surely that each and every page of the draft order would have been carefully read by all, and that measures were adopted to ensure that the integrity of the draft order, as approved, would remain intact. Given so, it would not seem probable that so many trained eyes could have failed to notice that the said Schedule E, which was a long list of seven assets or properties, was mentioned and annexed to the said draft order.

[8] Our examination of the appeal record only confirmed that the said Schedule E was consciously left out from the said order dated 18 July 1994. In the first place, as was correctly pointed out by Mr Saranjit Singh, the prayer for the assets and properties listed in Schedule E was alternative to the prayer for the assets and properties listed in Schedules A, B and C (see p 320 of the appeal record). Hence, the order in the judgment (see p 521 of the appeal record) 'That the defendants' counterclaim be allowed with costs and that all the properties listed in Schedules A, B and C be distributed equally between ... These properties include ... ' (see prayer 521 of the appeal record) was entirely at one with the prayers.

[9] In point of fact, it was fully appreciated by the instant appellant, Tiew Kun that no order was made by Siti Norma J on the alternative prayer. Now, appeals and cross-appeals (W-02–5 of 1994 and W-02–27 of 1994) were lodged against the said order dated 18 July 1994. In the case of the cross-appeal of the instant appellant, Tiew Kun, he sought to vary the said order dated 18 July 1994, inter alia, on the ground that the learned judge had omitted Schedule E (see p 668 of the appeal record):

> The learned judge erred in law and/or in fact in totally omitting, overlooking or failing to consider sufficiently or at all the counterclaim in respect of the properties/assets/shares/interests of the family held in the names of ... as set out in Schedule E.

[10] Therefore, unquestionably, the appellant, Tiew Kun knew that no order was made on Schedule E. The Court of Appeal also understood the judgment of the High Court to be 'that the properties listed in Schedules A, B and C in the counterclaims together with certain other specified properties be distributed equally between ...' (see p 536 of the appeal record). In

particular, in relation to the counterclaim of the appellants, Ahmad Fairuz JCA, as he then was, held as follows:

> As regards the respondents' counterclaims, the judgment of the learned High Court Judge shows clearly that the learned judge had based her decision on the same findings of fact highlighted above. Because of those findings of fact, the learned judge directed that the properties in Schedules A, B and C in the counterclaims be distributed equally between ...

[11] And in relation to those cross-appeals by the instant appellants, Ahmad Fairuz JCA pronounced as follows (see p 551 of the appeal record):

> Consequently, prayers 1(a) and (b) of the cross-appeal ought to be dismissed. Prayer 1(c) of the cross-appeal of the first and second respondents and prayer 1(c) of the cross-appeal of the third and fourth respondents ought to be dismissed ... Prayers 1(d) to (i) of the cross-appeal of the first and second respondents and prayers 1(b) to (g) of the cross-appeal of the third and fourth respondents too ought to be dismissed ...

[12] The Court of Appeal per Abdul Malek Ahmad JCA, as he then was, then shut all doors to any interpretation of its order in relation those appeals and cross-appeals (see p 570 of the appeal record):

> Having evaluated the evidence, the learned trial judge finally made the following orders:
>
> (a) that the claims be dismissed with costs;
>
> (b) that the counterclaims be allowed with costs and that all the properties listed in Schedules A, B, and C therein be distributed equally between Tneu Beh, Boon Eu, Boon Beng and Boon Seng. These properties include ...
>
> (c) ...
>
> Accordingly, we dismissed both the appeals with costs. As for the cross-appeals, we saw no reason to vary the learned trial judge's orders as prayed for in the counterclaims. They were also dismissed with costs.

[13] It was so obviously irrefragable, that the said Schedule E was not part or parcel of the said order dated 18 July 1994. No wonder, Mr Saranjit had remarked, cathartically, 'how could it be argued now that the order included Schedule E?'

A **[14]** It was for those reasons that we had dismissed these appeals on 13 May 2009.

Appeals dismissed.

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Reported by Andrew Christopher Simon

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